Public Investors Arbitration Bar Association

February 7, 2013

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-FINRA-2013-003: Proposed Rule Change to Amend FINRA's Customer and Industry Codes of Arbitration Procedure to Revise the Public Arbitrator Definition

Dear Ms. Murphy:

Pursuant to Rule of Practice 192(a) of the Securities and Exchange Commission ("SEC"), the Public Investors Arbitration Bar Association ("PIABA") submits this comment to the SEC concerning SR-FINRA-2013-003 and FINRA's proposed changes to FINRA Rule 12100. The proposal seeks to revise the definition of a "public arbitrator" under the rules governing arbitrations brought by investors. PIABA believes that these changes are a step in the right direction and should be approved. At the same time, PIABA believes that additional changes to the definition of the term "public arbitrator" should be pursued and approved to promote the fairness and the perception of fairness of the FINRA arbitration forum.

PIABA is a bar association, which promotes the interests of the public investor in securities arbitrations and advocates for investor rights. PIABA frequently comments upon proposed rule changes that affect the arbitration process to seek to protect the rights and fair treatment of the investing public. PIABA submits this comment because it believes the proposed rule changes should be approved and because it believes further changes to the "public arbitrator" definition are needed.

FINRA Rule 12100 defines the terms used within the Code relating to investor claims. The proposed changes seek to revise the definition contained in subsection (u) of the term "public arbitrator". FINRA's proposed rule changes incorporate two improvements to Rule 12100. The first change is to subsection (u)(3) and adds that, in addition to investment advisers, persons associated with, including registered through, a mutual fund or hedge fund shall not be considered public arbitrators. The second modification to Rule 12100 proposes to add a two-year "cooling off" period before persons with certain affiliations to the securities industry can become public arbitrators. Such affiliations include, in addition to investment advisers and those associated with mutual funds and hedge funds; attorneys, accountants, and other professionals with a requisite

amount of business from customer disputes relating to investment accounts or in representing members of the securities or commodities industry; those affiliated with entities that control a securities related entity; and an immediate family member of an officer or director of an entity controlling a securities related entity.

These changes improve the FINRA arbitration forum and should be approved.

Additional changes to the definition of "public arbitrator" which should be pursued and adopted include the following. First, changes should be implemented to exclude from the "public arbitrator" definition a wider range of persons who are affiliated with entities that sponsor or issue investment products. Second, certain persons should be precluded from ever being classified as public arbitrators, and the "cooling off" period for certain persons directly or indirectly affiliated with the securities industry should be lengthened.

I. Changes should be implemented to expressly exclude from the definition of "public arbitrator" persons associated with issuers or sponsors of private placements, publicly offered non-traded REITs, variable insurance products, and other investment products.

Changes to Rule 12100(u)(3) which should be pursued and adopted include expanding the persons who cannot be classified as public arbitrators beyond those persons associated with hedge funds and mutual funds. FINRA has proposed adding to the list of persons expressly excluded from the public arbitrator classification individuals affiliated with hedge funds or mutual funds because of their "association with the securities industry". SR-FINRA-2013-003, Pg. 10. However, this exclusion does not go far enough.

FINRA's Conduct Rules, including, but not limited to, FINRA's suitability and know your customer rule (Rule 2111 and Rule 2090), apply to many products in addition to hedge funds and mutual funds. Some of these other investment products have become more frequent subjects of investors' arbitration claims. Professionals who are affiliated with the sponsors or issuers of such products or any securities products, for that matter, should not be allowed to serve as public arbitrators.

For example, many current investor claims involve private placements, publicly offered non-traded REITs (non-traded REITs), and variable annuities. Under the current rule and the proposed modified rule, all three arbitrators on a panel could be employees of a sponsor or issuer of private placements, non-traded REITs, or variable annuities and could still hear a case concerning the suitability of such investments.

In five years, investor claims could concern investment products which are not currently in the marketplace or even contemplated. Therefore, changes to the definition of the term "public arbitrator" are needed to exclude from the definition individuals who are affiliated with issuers or sponsors of private placements, non-

traded REITs, variable products, and other investment products that may arise in the future. The definition of "public arbitrator" should be amended to exclude individuals who are affiliated with entities which act as sponsors, issuers, marketers, or sellers of securities or other investment products with embedded securities.

II. Certain individuals affiliated with the securities industry should never be classified as a "public arbitrator" and as to others the cooling off period should be extended.

The proposed changes to Rule 12100 would require a two year cooling-off period from the date on which the persons described in subsections (3)-(8) of section (u) of Rule 12100 cease their direct or indirect affiliations with the securities industry. PIABA believes that the implementation of a cooling-off period of two years for the persons described in these subsections of the Rule is an improvement over the current rule. However, further changes to the "public arbitrator" definition need to be implemented.

PIABA believes that persons who have worked for more than a de minimis period of time as a stockbroker or investment advisor should be precluded from ever being classified as a "public arbitrator". In addition, persons with more than a de minimis length of affiliation with a member firm, an investment advisory firm, a hedge fund, a mutual fund, or an issuer, sponsor, marketer, or seller of securities or investment products with embedded securities should, likewise, be precluded from ever being classified as a "public arbitrator". Allowing such persons to be classified as public arbitrators after a "cooling-off" period engenders to the perception of unfairness with respect to the FINRA arbitration forum and creates the possibility that persons with loyalties or connections to the securities industry are presiding as arbitrators over investors' claims.

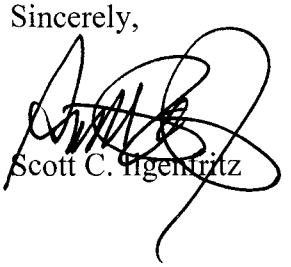
With respect to persons with less direct affiliations with the securities industry, including attorneys, accountants, and other professionals and family members of persons directly affiliated with the securities industry, a "cooling-off" period of more than two years should be implemented. A two year "cooling-off" period is inadequate for attorneys, accountants, and other professionals who meet the representation criteria specified in subsections (u)(4) and (5) of Rule 12100. A professional who does not meet the representation criteria set forth in the above-listed subsections during a two year period of time may well still intend to continue such representation. Under the proposed modified rule, professionals who have devoted their careers to representing entities or persons involved in the securities industry would qualify as a "public arbitrator" two years after such individual ceased representation of or work for securities industry participants. Such persons being able to be classified as public arbitrators two years after ceasing such representation or work, again, engenders the perception of unfairness with respect to the FINRA arbitration forum. Consideration should be given to excluding from "public arbitrator" classification professionals who have individually represented or who have worked with firms that have represented securities industry participants for more than a specified number of years.

Likewise, extending the "cooling-off" period of persons with less direct connections with the securities industry, such as family members of securities industry participants, would improve the perception of the FINRA arbitration forum.

III. Conclusion.

As the Supreme Court has said, the SEC has broad authority to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect investors. *Shearson/American Express v. McMahon*, 482 U.S. 220, 234-35 (1987). The stated objective of FINRA's proposed rule change is to "improve investor confidence in the neutrality of FINRA's public arbitrator roster." SR-FINRA-2013-003, Pg. 8. PIABA supports the proposed rule changes, but it believes that the above-described rule changes should be pursued and implemented to improve investor perception of the FINRA arbitration forum and to promote FINRA's stated mission of investor protection.

Sincerely,



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